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15-35, 15-105, 15-119, & 15-191

In the
Supreme Court of the United States

EAST TEXAS BAPTIST UNIVERSITY, ET AL.,
Petitioners
v.
SYLVIA BURWELL, ET AL., *Respondents*

LITTLE SISTERS OF THE POOR HOME FOR THE AGED,
DENVER, COLORADO, ET AL., *Petitioners*
v.
SYLVIA BURWELL, ET AL., *Respondents*

SOUTHERN NAZARENE UNIVERSITY, ET AL.,
Petitioners
v.
SYLVIA BURWELL, ET AL., *Respondents*

GENEVA COLLEGE, *Petitioner*
v.
SYLVIA BURWELL, ET AL., *Respondents*

On Writs of Certiorari to the United States Courts of Appeals for the Third, Fifth, Tenth, and D.C. Circuits

REPLY BRIEF FOR PETITIONERS IN NOS. 15-35, 15-105, 15-119, & 15-191

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REPLY BRIEF

The government's response brief is a study in misdirection and contradiction. Unable to answer petitioners' substantial burden argument on its own terms, the government resorts to attacking a strawman, insisting that petitioners are stubbornly objecting to the very act of objecting. But not only have petitioners made abundantly clear that they do *not* object to objecting; the government ultimately concedes in the final two pages of its brief that its regulatory scheme demands—indeed, by its own telling, *necessitates*—far more from petitioners than mere notice of their objections (which it of course already has). The government itself thus reveals that it does not offer a simple "opt out." Indeed, if all the government demanded were notice of an objection, then this litigation would suffice, and the government's threat to impose massive penalties for failing to provide specific information would be inexplicable.

The government likewise fails to explain why it exempts—not "accommodates," but truly exempts—*some* religious employers if compliance via the regulatory mechanism imposes no substantial burden. The government insists that it does so as a matter of administrative grace and "special solicitude" for churches, and that nothing in RFRA *requires* the exemption. Thus, in the government's view, it could eliminate the exemption for churches tomorrow. That is astonishing enough, but it fails to grapple with the reality that by granting the exemption the government has already conceded that it does not have a compelling interest in demanding compliance from

religious employers who are more likely to hire people who share their religious objections. But the government has no more compelling interest in demanding compliance from petitioners, who share the same statutory entitlement to hire people who share their own faith as the exempted employers.

Nor can the government escape the reality that the mandate's secular exemptions and the government's own concessions regarding them doom its least-restrictive means defense. The government claims that asking whatever subset of petitioners' employees who actually *want* contraceptive coverage to obtain it through an Exchange would "inflict tangible injury" that cannot be tolerated. But the government itself *champions* the Exchanges not a dozen pages earlier in its brief as one of several acceptable paths through which the tens of millions of employees whose employers are already exempt can obtain contraceptive coverage. The government simply cannot explain why what it deems sufficient for all the other individuals who lack access to an employer-sponsored plan with contraceptive coverage (whether because of the religious exemption, the grandfathered plans exemption, or the small business exemption) is somehow too burdensome for *petitioners'* employees.

In the end, then, this case does not require the Court to choose between the dignity of petitioners' employees and the religious liberty of petitioners. Indeed, it does not even require the Court to decide whether Congress could impose the contraceptive mandate on all employers, or on all non-religious employers. Congress concluded in the ACA that it was

not imperative to apply the preventive services mandate to all employers, even as it demanded immediate compliance with other mandates. And Congress concluded in RFRA that *all* those whose religious exercise is substantially burdened by the federal government—not just the lucky few favored by the executive—are entitled to an exemption when imposing that burden is not imperative. This Court need do nothing more in this case than honor those congressional judgments. Conscripting nuns, seminaries, and other religious nonprofits to facilitate access to something as obviously religiously sensitive as contraceptives and abortifacients substantially burdens their religious exercise, as even the government implicitly recognizes when it comes to churches. Doing so when Congress itself has concluded that universal compliance is unnecessary is a textbook violation of RFRA.

ARGUMENT

I. The Regulatory Mechanism For Compliance With The Contraceptive Mandate Substantially Burdens Petitioners' Religious Exercise.

A. Petitioners Are Not Objecting to Objecting and Claim No Right to Do So.

The government's substantial burden argument rests on a single, flawed premise: that petitioners are just "objecting to objecting," or to the act of "opting out." The government invokes this fiction ad nauseam, yet it tellingly fails to identify a single instance in which *petitioners* have ever claimed that RFRA entitles them to object to the mere act of informing the government of their religious objections.

That is unsurprising, as petitioners not only informed the government of their objections the moment they initiated these lawsuits (if not before), but also went to great pains in their opening brief to make clear that they do *not* object to objecting. What they object to is the government's insistence that they execute documents that the government itself deems necessary to its efforts to get contraceptive coverage to their employees. *See, e.g.*, *ETBU* Br.43-44, 76. As petitioners explained, it is the government's insistence on *not* taking a simple objection as an answer, and instead demanding a dual-purpose objection that facilitates coverage through their own plan infrastructure, that explains why this case did not end (and why contraceptive coverage did not flow) as soon as the government learned of petitioners' objections.

Unwilling to let that explanation get in the way of a good strawman, the government insists that petitioners *must* be "objecting to objecting" because that is all the government has asked them to do. That is, quite simply, demonstrably false. It is not just semantics that the government deems the regulatory mechanism a means of *complying* with the contraceptive mandate. *See* 45 C.F.R. §147.131(c)(1); 26 C.F.R. §54.9815-2713(b)(1). The government does so for a substantive reason: The regulatory mechanism requires petitioners not just to object, but to affirmatively aid the government's efforts to get contraceptive coverage to their employees. That much is evident from the reality that the government requires additional information beyond the fact of objection, that one of the means of "objecting" involves transmitting information to insurers and TPAs (and not the government), and, perhaps most obviously,

that the government imposes massive penalties for failing to provide the information it demands. If all the government required were notice of petitioners' intent to object, there would be no need to impose massive penalties for non-compliance.

Indeed, the government *itself* ultimately concedes (albeit only in the final two pages of its brief) that it not only wants, but needs, petitioners to do more than object. As the government belatedly concedes, its regulatory scheme will not work unless petitioners, at a minimum, supply the government not just with written notice of their objections, but also with "the name and contact information for any of the plan's third party administrators and health insurance issuers," 45 C.F.R. §147.131(c)(1)(ii). *See* Resp.Br.88-89. According to the government, requiring *petitioners* to supply that information is "'necessary'" because it has no means of obtaining it other than from petitioners. Resp.Br.88 (quoting 80 Fed. Reg. 41,318, 41,323 (July 14, 2015)).

Setting aside whether that is actually so[1], that concession should be the end of the substantial burden analysis. The government now concedes that it is using massive financial pressure to compel petitioners to not just object, but to supply information that the government deems "necessary" to get contraceptive coverage to their employees. The fact that this

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[1] It strains credulity that obtaining this information from someone other than petitioners is somehow beyond the government's ken. At a bare minimum, the government could wait until an employee actually asserts an interest in obtaining cost-free contraceptive coverage and then ask that employee to supply the information.

concession comes at page 88 of the government's brief does not make it any less fatal to the substantial burden argument that the government makes 30 pages earlier. Having admitted that petitioners' affirmative assistance is "necessary" to its regulatory scheme, the government cannot plausibly claim that petitioners are just objecting to objecting, or that they are not being compelled, by threat of draconian penalties, to take steps to facilitate the provision of contraceptive coverage. Petitioners have sincere religious objections to taking those steps. That is enough to satisfy the substantial burden analysis.

That said, while even that degree of facilitation (*i.e.*, the provision of the information the government believes is necessary) would be legally sufficient, the government in fact seeks far more. What the government really wants from petitioners is the plan infrastructure and contractual relationships that it needs to achieve the "seamless" provision of contraceptive coverage to petitioners' employees. That is plain on the face of the government's regulations for self-insured nonexempt religious employers. When an employer does not have a relationship with a third-party *insurer* that the government can exploit to achieve its ends, the government requires the employer not just to supply the identity of any TPA it uses, but also to "contract with one or more third party administrators" in the first place. 26 C.F.R. §54.9815-2713A(b)(1); *see also* 78 Fed. Reg. 39,870, 39,880 (July 2, 2013). That is not a generally applicable ERISA requirement; it is imposed *only* on self-insured religious organizations that seek to comply with the contraceptive mandate via the regulatory mechanism.

As that requirement underscores, the government's interest in petitioners' contractual relationships is not merely informational. Its interest lies in the contractual relationship itself, which the government needs to ensure that there is some third party in a position to use petitioners' own plan infrastructure to provide the coverage. If after giving the government its initial notification of both its objection and the requisite information concerning its TPA, a self-insured employer were to sever its relationship with its TPA (say, because it does not want to contract with a TPA willing to provide contraceptive coverage), then it would no longer be in compliance with the mandate—even though it informed the government of its religious objections and provided the requisite information about its then-current TPA. And the employer would come back into compliance only if it entered into a contractual relationship with a new TPA (and gave the government updated information), ensuring that the government would once again have at the ready a third party with direct access to the employer's plan infrastructure.

And the government does not stop even there. Indeed, the government itself admits that it already *has* the identity of several petitioners' insurers and TPAs, and even believes that it has identified a third party willing to provide the coverage in each of those instances, *see* Resp.Br.60-61, yet it *still* has not deemed those petitioners in compliance or relented in its demand for massive fines. If all the government needed from the Little Sisters was to know that "they believe that it is religiously wrong for them to facilitate the provision of contraceptive procedures

and devices," *ETBU* Br.29, that their health plan "uses Christian Brothers Services ... as its principal TPA," *id.*, and that Express Scripts "processes pharmaceutical claims under the Little Sisters' plan," *id.* at 30; *see also* No. 1505 Pet.12 n.2, then there would be no need to continue threatening them with massive fines. Indeed, the Little Sisters provided additional written notice of their objections in response to this Court's injunction, *see Little Sisters of the Poor Home for the Aged v. Sebelius*, 134 S. Ct. 1022 (2014), and yet the government *still* does not consider them in compliance with the mandate.

The problem is the government still does not have the last piece in its puzzle: a written document that it can construe as sufficient to *authorize* those third parties to use petitioners' plan infrastructure to provide contraceptive coverage to their employees. Indeed, the government acknowledges (albeit buried in a footnote) that the written objection it demands serves this dual purpose, as the employer's act of "submitting the self-certification form to its TPA ... has the legal effect of designating the TPA as the plan administrator responsible for providing contraceptive coverage." Resp.Br.16 n.4. And the government acknowledges that "notifying HHS directly" will serve the same dual purpose. *Id.* But the government admits that the designation will not—and cannot—be made unless the employer supplies some written document that the government can deem sufficient to authorize the employer's TPA to take on that role. The right analogy thus is not to the conscientious objector who objects to objecting, but to the conscientious objector who objects to objecting on a form that designates a substitute and that the government

deems sufficient to authorize and obligate the substitute to serve in his stead.

In short, there are substantive, not semantic, reasons why the government deems an employer who takes the necessary steps to be *in compliance with*—not just an objector to—the contraceptive mandate. When the government admits that executing the documents will give rise to a new "plan instrument," Resp.Br.16 n.4, what it really means is that it is altering the terms of the employer's plan—which, by the government's own telling, is the only plan in the picture. *See, e.g.*, 78 Fed. Reg. at 39,875 (explaining that there will not be "two separate health insurance policies (that is, the group health insurance policy and the individual contraceptive coverage policy)"). When it admits that it is designating the TPA a "plan administrator," Resp.Br.16 n.4, what it really means is that it is appointing someone to administer the employer's plan against the employer's will. When it admits that it is utilizing the existing "coverage administration infrastructure," 80 Fed. Reg. at 41,328-29, what it really means is that it is using the very plan infrastructure that the employer created and maintains. And when it admits that it cannot do any of those things unless petitioners execute the requisite documents, what it really means is that it needs petitioners' permission—not an objection—to get the objectionable coverage to flow. That "[t]he government has hidden that legal authority in self-certification and alternative notice" does not alter that conclusion in the slightest; the government is still requiring *petitioners* to supply the authorization on which its regulatory scheme relies. *Grace Sch. v.*

Burwell, 801 F.3d 788, 811 (7th Cir. 2015) (Manion, J., dissenting).

That reality is thrown into sharp relief when petitioners' situation is compared to that of religious employers that the government truly exempts. Houses of worship and their integrated auxiliaries are not deemed in *compliance* with the contraceptive mandate. They are *exempt*. And for that precise reason, they need not take any of the steps demanded of petitioners. They need not identify their TPAs or insurers, or maintain a contractual relationship with a TPA, or provide any document deemed sufficient to give rise to a new "plan instrument," or suffer the appointment of a new "plan administrator" against their will. Indeed, they need not even object. They need not do any of those things because they are truly exempt.

The government thus recognizes better than anyone that there is a real, substantive difference between how it treats petitioners and how it treats the religious employers that it has exempted. And if the difference is substantial enough to deem one group in compliance with the mandate and the other exempt, then it is a bit much to insist that the former are doing nothing to facilitate the provision of contraceptive coverage. Indeed, if the government really were correct that nonexempt religious employers are deemed in compliance with the contraceptive mandate even though they are doing *nothing* to facilitate the provision of contraceptive coverage, then both the penalties (apparently for doing nothing) and the exemption (apparently from doing nothing) would be entirely inexplicable.

B. RFRA Does Not Bar Religious Exercises Rooted in the Consequences of "Otherwise-Unobjectionable" Acts.

Stripped of the false premise that petitioners object even to objecting, the government's substantial burden defense reduces to rehashing arguments that are flatly contrary to this Court's precedents—not to mention common sense. According to the government, petitioners cannot bring a RFRA claim unless they inherently object to the acts they are forced to take, independent of their consequences. Thus, unless petitioners hold sincere religious objections to the act of executing documents "notifying the government of their objections and identifying their insurers and TPAs"—wholly apart from the consequences of doing so—they are categorically foreclosed from invoking RFRA. Resp.Br.36.

That is nonsense premised on an utterly false dichotomy. The religious significance of signing a piece of paper will often depend on its consequences. Signing an autograph and signing a death warrant are not the same. And the notion that a religious adherent cannot object to the latter unless she also objects to the former, based on a religious scruple against the signing of her name altogether, is just plain silly. Indeed, it is inconceivable that RFRA—a statute that protects "any exercise of religion" and "shall be construed in favor of a broad protection of religious exercise," 42 U.S.C. §§2000cc-5(7), 2000cc-3(g)—categorically forecloses religious exercises grounded in the same principles of facilitation and complicity that pervade most religions and countless provisions of the

U.S. Code. *See Former Justice Dep't Officials Amicus* Br.7-15.

Unsurprisingly, the government's contrary argument finds no support in this Court's precedent. Not only has this Court repeatedly admonished that it is the religious adherent and not the government, based on some bizarre deconstruction, who gets to define her religious scruples; the Court has done so in the specific context of religious beliefs rooted in the consequences of "otherwise-unobjectionable action." Resp.Br.45. *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981), is a textbook illustration of a religious objection "predicated not on the nature of the acts required of the religious objector, but instead on the independent actions the government will take in response." Resp.Br.45. That did not give this Court a moment's pause in upholding Thomas' claim. To the contrary, the Court went out of its way to reaffirm that "it is not for us to say that the line" Thomas drew as to how much facilitation is too much "was an unreasonable one." *Thomas*, 450 U.S. at 715. That reticence would have been inexplicable if religious scruples rooted in the consequences of "otherwise-unobjectionable action" do not "qualify as cognizable." Resp.Br.45.

Indeed, the government's argument is one step removed from the one that this Court rejected in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). There, the government insisted that the employers' RFRA claims were not "cognizable" because (among other things) their connection to "the actions ... of independent actors"—*i.e.*, the employees who might use the contraceptive coverage—was too

"attenuated." Gov't.Br.32-33, *Hobby Lobby* (No. 13-354). And there, too, the Court reiterated that it is for the religious adherent, not agencies or courts, to decide "the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." *Hobby Lobby*, 134 S. Ct. at 2778. The Court plainly did not reject the government's invitation to scrutinize the religious adherent's resolution of that "religious and philosophical question," *id.*, just to accept the even more extraordinary proposition that religious beliefs grounded in objections to facilitation and complicity get no protection whatsoever.

The government does not even attempt to reconcile its argument with these cases. Instead, it makes the remarkable claim that there *is* "no case vindicating a claim" in which the religious objection stemmed from the consequences of "otherwise-unobjectionable action." Resp.Br.45. Not only are there multiple cases holding exactly that, but petitioners both cited and discussed them for that exact proposition in their opening brief. *See ETBU* Br.52. The government's refusal to acknowledge—let alone attempt to distinguish—these holdings speaks volumes.

The government fares no better with the cases it does acknowledge. Neither *Bowen v. Roy*, 476 U.S. 693 (1986), nor *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), provides the slightest support for the notion that a religious adherent may not object to an act based on the consequences it unleashes. Instead, those cases stand

only for the unremarkable proposition that a religious adherent may not object to third-party actions that he is not being compelled to facilitate. But here there is no doubt that the government is compelling facilitation via massive penalties—and those penalties do not turn on third-party actions. Even when providing the required information may not empower the government to ensure the provision of contraceptive coverage (as with the Little Sisters and other objectors who use self-insured church plans), the government insists on action from the employer and penalizes the employer's failure to take the compelled steps.

That basic distinction between what is required of the religious adherent (including the consequences that flow) and truly independent third-party actions is clear on the face of RFRA, which applies only when the government "substantially burden[s] a person's *exercise* of religion." 42 U.S.C. §2000bb-1(a) (emphasis added). To be sure, a religious adherent may find someone else's failure to abide by his faith objectionable. But if the government is neither pressuring the religious adherent to do something that violates his faith, nor interfering with his ability to do something that his faith commands, then there is no burden on religious *exercise*. *That* is how Congress imposed "objective limits on the burdens that qualify as cognizable," Resp.Br.45—not by empowering the executive to pick and choose which religious beliefs (or religious adherents) should count.

And that objective limit is precisely why petitioners have conceded repeatedly that they would *not* have a RFRA claim if the government were to

provide contraceptive coverage to their employees directly, or through Title X, or to subsidize their employees' purchase of such coverage on an Exchange—even if those alternatives became available only once petitioners informed the government of their religious objections. *See, e.g.*, *ETBU* Br.2; *id.* at 76. Petitioners recognize and respect the commonsense difference between objecting to the mere fact that a third party is taking action they find religiously objectionable, and objecting to being forced to facilitate that third-party action. It is the government that is trying to conflate the two.

In sum, the government cannot evade the strictures of RFRA by trying to convert petitioners' religious objections into something they are not. The government itself recognized (albeit implicitly) that *all* forms of compliance with the contraceptive mandate substantially burden sincere and cognizable religious beliefs when it chose to *exempt*—not just "accommodate"—some religious employers. If the government is truly unwilling to do the same for nuns, seminaries, and faith-based universities, then it must prove that forcing them to violate their concededly sincere beliefs about something as fundamental as what constitutes facilitating the destruction of human life is the "least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. §2000bb-1(b)(2). RFRA demands nothing less.

II. Compelling Petitioners To Comply With The Contraceptive Mandate Does Not Satisfy RFRA's Strict Scrutiny Test.

Much as the existence of the true exemption for *some* religious employers is devastating to the

government's efforts to deny a substantial burden, the existence of that exemption and additional ones for grandfathered plans and small businesses is devastating to the government's strict scrutiny defense. There are only two plausible explanations for the government's willingness to exempt the employers of tens of millions of employees from the contraceptive mandate: Either its interest is not compelling, or it can be furthered through means other than demanding compliance. The government understandably attempts to resist both explanations, as each is fatal to its strict scrutiny defense. But in the end, that leaves the government with no coherent explanation for why the mandate can tolerate exemptions for so many other employers, but not for petitioners.

A. The Government Has Not Proven a Compelling Interest in Applying the Contraceptive Mandate to Petitioners.

As this Court has explained, "a law cannot be regarded as protecting an interest of the highest order ... when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993). Accordingly, when, as here, the government seeks to deny an exemption to religious adherents while granting both religious and secular exemptions to countless others, it must prove that exempting those religious adherents would do "appreciable damage" to its claimed interest in some way that the existing exemptions do not.

The government insists that a statute with exemptions can nonetheless achieve a compelling

interest argument. Resp.Br.62. That is true, but the lesson of this Court's cases is that not all exemptions are equally fatal to the government's stated interest. It is that the government must explain why those exemptions are *consistent* with the interest it claims its regulatory scheme advances. Thus, while the government may be able to grant limited exemptions that do not undermine its statutory scheme, *see, e.g.*, *United States v. Lee*, 455 U.S. 252, 261 (1982), it cannot claim a compelling interest in universal compliance when its regulatory scheme has significant exemptions, *see, e.g.*, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 435-36 (2006).

The problem here is not that there are no rational explanations for why the agencies exempted many religious employers and Congress exempted small employers and large employers with grandfathered plans. The problem is that none of those explanations is consistent with the government's insistence that it has a compelling interest in denying a RFRA-based exemption to petitioners. There may be some circumstances (such as with religious employers) in which demanding compliance with the contraceptive mandate does not materially further the government's interests. Or it may be that the government has alternative means of achieving its interests (such as spousal coverage or the Exchanges) without demanding compliance. But there is simply no good reason why the government can exempt some closely analogous religious employers and some quite different secular employers and yet simultaneously insist that its "marginal interest in enforcing the

contraceptive mandate *in these cases*" is compelling. *Hobby Lobby*, 134 S. Ct. at 2779 (emphasis added).

1. The government cannot explain why it can exempt some religious employers, but not petitioners.

The first glaring problem for the government's compelling interest argument is the existing religious exemption. If the government's interest is truly "no less compelling with respect to the women who obtain their health coverage through employers with religious objections to contraception," Resp.Br.59, then why is it willing to exempt *some* religious employers from the contraceptive mandate entirely?

In the commentary accompanying their regulations, the agencies at least attempted to articulate why their exemption for some religious employers was compatible with their claimed interests, explaining that "[h]ouses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39,874. That is an eminently reasonable explanation for why an exemption for *all* objecting religious organizations likely to employ co-religionists would not undermine the government's claimed interests. But it does not begin to explain why the agencies exempted only houses of worship and their integrated auxiliaries—without regard to whether they or their co-religionists even have religious objections—and yet refused to

exempt petitioners notwithstanding their concededly sincere religious objections.

After all, petitioners—no less than churches and their auxiliaries—are not just *likely* to employ people who share their faith; they have the exact same *statutory entitlement* to employ *only* people who do so. *Congress* has not confined its religious exemptions in the employer-employee relationships realm to houses of worship and their integrated auxiliaries. *Congress* has exempted *any* nonprofit "religious corporation, association, educational institution, or society" from the obligation to comply with Title VII. 42 U.S.C. §2000e-1(a).

To be sure, not all "religious organizations opposed to contraceptives employ and enroll" only people who "share their faiths." Resp.Br.59. But the relevant question under the agencies' contemporaneous explanation is whether a religious organization is "*more likely* than other employers to employ people of the same faith who share the same objection." 78 Fed. Reg. at 39,874 (emphasis added). In fact, the agencies *eliminated* a provision that would have "disqualified" a religious organization that "hires or serves people of different religious faiths." *Id.* And, at a bare minimum, an employer that is statutorily entitled to hire *only* co-religionists is "more likely" to do so than other employers who do not share the Title VII exemption.[2] Thus, if the government's interests

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[2] Indeed, if these cases are any indication, many organizations with objections to the mandate actually *require* their employees (and, where applicable, students) to abide by their faith. *See ETBU* Br.25-37. And if the government's own *amici* are any indication, even those that do not *require* people to abide by their

are not undermined by the existing religious exemption, then they would not be undermined by an exemption that adopts the line Congress drew in its religious exemption to Title VII.

Adopting that line would not require an "intrusive 'field study' of the religious beliefs, sexual activities, and health needs of the women covered under each employer's health plan." Resp.Br.59. It would simply entail importing "a bright line that [i]s already statutorily codified and frequently applied," Resp.Br.71—a line the government itself has described as "justified to protect 'religious organizations[] ... interest in autonomy in ordering their internal affairs.'" Gov't.Br.20, *Hobby Lobby* (No. 13-354). Indeed, if Congress is willing to allow a religious organization to hire and fire people based on whether they abide by its faith, then it is hard to see why Congress would have wanted to force that same organization to ensure that its employees have cost-free access to benefits that their shared religion forbids them from using.

But even if the agencies were insistent on keying their religious exemption to the Tax Code, rather than Title VII, then they should have at least looked to the provisions of the Tax Code that are actually relevant—*i.e.*, those authorizing certain religious organizations to use ERISA-exempt church plans to provide health

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faith predominantly attract people who do: Of the individuals that joined the Brief of 240 Students, Faculty, and Staff at Religiously Affiliated Universities as *Amici Curiae* in Support of Respondents, only four come from a university that actually objects to complying with the mandate (and two have transferred).

benefits. *See* 26 U.S.C. §414(e). Unlike the obligation to file a tax return, eligibility to use a church plan at least bears some connection to the provision of health benefits. And keying the exemption to the church plan statute would have had the additional benefit of ensuring that the mandate applies only when it *actually* furthers the government's professed interest, not when, as with the Little Sisters (and the hundreds of similarly situated employers that they represent), the best the government can say is that it "appears" that forcing compliance "may well" result in cost-free contraceptive coverage. Resp.Br.61. Indeed, when the very reason forcing an employer to comply may not achieve the government's desired ends is because *Congress* has provided a religious exemption that prevents agencies from exerting control over an employer's health plan, that is a sure sign that the agencies have drawn the line far short of what RFRA and common sense demand.

Rather than try to explain how its initial explanation for exempting some religious employers would not apply equally to petitioners, the government abandons that explanation entirely. It now claims the religious exemption was provided not because the government's interests are any less compelling as to religious employers who are more likely to employ co-religionists, but because of the government's "special solicitude for houses of worship" (which apparently extends to their "integrated auxiliaries" as well). Resp.Br.67. But for the government to extend "special solicitude" to some religious entities but not others (priests not nuns; a denomination-controlled seminary, but not an independent seminary) based on ad hoc judgments

having nothing to do with whether they hold religious objections or whether their compliance is necessary to achieving the government's compelling interest is to embrace a hornets' nest of constitutional concerns.

That is perhaps why in *Hobby Lobby* the government endorsed the far less problematic position that "'special solicitude to the rights of religious organizations'" should be measured by "Title VII's exemption for religious employers," not whether a religious organization must file a tax return. Gov't.Br.20, *Hobby Lobby* (No. 13-354) (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012)). So, too, did some of the dissenting Justices in *Hobby Lobby*. *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2794-95 & n.15 (Ginsburg, J., dissenting) ("The First Amendment's free exercise protections, the Court has indeed recognized, shelter churches *and other nonprofit religion-based organizations*." (emphasis added)). As the government seemed to recognize then, nothing allows it to divide up religious nonprofits and proclaim that exempting hundreds of thousands is consistent with its compelling interests, but that those same compelling interests demand compliance from the remaining few thousand. Whether or not this picking and choosing among religious employers with the exact same religious objections and the exact same statutory ability to preferentially hire co-religionists violates the Constitution, it fatally undermines the government's argument that exempting petitioners would be incompatible with its compelling interests.

The government attempts to avoid this problem by claiming that RFRA does not require it to exempt

any religious employers; the existing exemption is simply an exercise of its "discretion[]" to grant "religious exemptions, above and beyond those that RFRA compels." Resp.Br.68. Thus, in the government's view, it could eliminate that exemption entirely, and compel churches to authorize their plans to serve as vehicles for supplying free abortifacients and contraceptives too, and RFRA would have nothing to say about it. That is a startling and extreme position, but it does not solve the government's compelling interest problem. Indeed, if the government really extended the exemption to churches and their auxiliaries as a matter of administrative grace and not legal necessity, that only underscores that it must have thought doing so was consistent with achieving its compelling interest. And if the government can achieve its compelling interest while exempting all those religious employers, it must demonstrate why a similar exemption for petitioners would fatally undermine those same compelling interests. Even at this late stage, the government has never done so.

2. The mandate's secular exemptions further undermine the government's compelling interest argument.

The government's strict scrutiny arguments are undermined not just by the religious exemption but by the secular exemptions enacted by Congress as well. Take, for instance, the statutory exemption for the roughly 30% of large employers that continue to offer grandfathered plans. It is hard to see how the mandate furthers an interest so compelling as to override sincere religious beliefs when Congress

granted such a broad exemption based "simply [on] the interest of employers in avoiding the inconvenience of amending an existing plan." *Hobby Lobby*, 134 S. Ct. at 2780.

The government tries to dismiss this exemption as "temporary and transitional," Resp.Br.64, but it does not dispute that there is "no legal requirement that grandfathered plans ever be phased out," *Hobby Lobby*, 134 S. Ct. at 2764 n.10. In fact, the percentage of grandfathered plans has remained nearly constant in recent years, Kaiser Family Found. & Health Research & Educ. Trust, *Employer Health Benefits 2015 Annual Survey* 217 (2015)—perhaps because the government's regulations help perpetuate their existence. *See* 45 C.F.R. §147.140(g)(1)(iv) (allowing grandfathered plans to increase copayments for medical inflation). Nor does the government account for the fact that Congress viewed other coverage requirements (such as for pre-existing conditions or dependents under age 26) sufficiently compelling to mandate them even as to grandfathered plans.

The government makes a half-hearted attempt to explain why this exemption does not do appreciable damage to its professed interests, hypothesizing that "most women currently covered under grandfathered plans likely have ... some contraceptive coverage." Resp.Br.63. But it identifies not a shred of evidence that Congress exempted grandfathered plans from the "preventive services" mandate because it assumed most of them already included contraceptive coverage. In reality, *Congress* could not have given the matter extensive thought because *Congress* did not mandate that employers provide contraceptive coverage,

leaving that issue to the agencies. And to the extent Congress considered the issue at all, it almost certainly embraced the contrary view since the whole point of any grandfathering exception is to relieve those it covers from the obligation to come into compliance. A grandfathering clause for those already in compliance is an oxymoron. At any rate, the government's sole support for this post hoc rationalization is a study suggesting that 86% of *all* plans include cost-free contraceptive coverage, which says very little about how many *grandfathered* plans do. *See* Resp.Br.64 n.26.

The government's attempt to rationalize the small business exemption fares no better. According to the government, that exemption does not undermine its interest because the *real* "point of the contraceptive-coverage requirement is to ensure that organizations that *do* provide health coverage—whether employers or insurers—include full and equal coverage appropriate to women's health needs." Resp.Br.65. But that explains the small business exemption only at the expense of defining the government's interest in a manner that is utterly incompatible with the grandfathered plans and religious exemptions, which leave both employers and their insurers (and their TPAs) free to provide health coverage that does *not* include contraceptive coverage. Indeed, it defines the government's interest in a manner that is not even consistent with how the government itself provides health benefits; the TRICARE system through which it provides benefits to nearly 10 million military servicemembers and their dependents does not

include cost-free coverage for all FDA-approved contraceptives.[3]

At a minimum, then, the exemptions reveal the government's latest formulation of its purportedly compelling interest as nothing more than a "convenient litigating position." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988). The government seeks to reverse-engineer an interest sufficiently narrow to allow it to claim that "arranging for the same insurers and TPAs that are already providing [petitioners' employees] with other health coverage to provide separate contraceptive coverage" is the only way to achieve it. Resp.Br.73-74. That argument is wonderfully circular, as it would allow the government to avoid the least-restrictive means analysis entirely. But the government cannot plausibly claim a compelling interest in using particular *means*, rather than achieving particular *ends*, when it does not insist on employing those same means for the myriad employers who are already exempt. The government must instead identify a compelling interest that is actually *consistent* with its regulatory scheme—exemptions and all. Having failed to do so, the government is left with a regulatory scheme that "leaves appreciable damage to [its] supposedly vital interest unprohibited," *Lukumi*, 508 U.S. at 547, which is fatal under RFRA.

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[3] *See* TRICARE, *Family Planning*, *available at* https://perma.cc/3zms-cjpd (identifying forms of FDA-approved contraceptives not covered); Health Net Federal Services, *Birth Control*, *available at* https://perma.cc/dn93-ablw (identifying cost-sharing for IUDs).

B. The Government Has Less Restrictive Means of Achieving Its Asserted Interests.

Even if the government could demonstrate that forcing petitioners to comply with the contraceptive mandate furthers some compelling interest other than the made-for-litigation one it identifies, it falls woefully short of satisfying RFRA's "exceptionally demanding" least-restrictive means test. *Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015). Indeed, the government's concessions with respect to the existing exemptions doom any prospect of establishing that it lacks viable options for getting cost-free contraceptive coverage to petitioners' employees without involving petitioners.

According to the government, those exemptions are acceptable because employees who lack access to contraceptive coverage through an employer-sponsored plan can "obtain coverage through a family member's employer, through an individual insurance policy purchased on an Exchange or directly from an insurer, or through Medicaid or another program." Resp.Br.65. But the exact same thing is true of petitioners' employees. Just like the employees of exempt religious employers, or small businesses, or employers with grandfathered plans, if they want a plan that includes contraceptive coverage, they can obtain one on an Exchange or through the other routes the government identifies.

The government cannot explain why these alternatives suffice to achieve its interests for tens of millions of other employees, but not for whatever subset of petitioners' employees might want

contraceptive coverage. The government has never even bothered to check how many of petitioners' employees can get contraceptive coverage through a family member's plan—the ultimate least restrictive alternative. And the government does not claim that "requiring" other employees "to seek out or sign up for" a plan on an Exchange if they cannot obtain contraceptive coverage through their employers or a family member is so burdensome as to "inflict tangible harm" or "defeat [its] compelling interests in enhancing access to such coverage." Resp.Br.74, 78. Instead, when it comes to employees of exempt employers, the government *champions* the Exchanges. *See* Resp.Br.28, 65. The government cannot seriously mean to suggest that obtaining insurance on an Exchange is more burdensome for *petitioners'* employees than for anyone else—particularly when the government itself previously encouraged petitioners to drop their health plans altogether *and send their employees to the Exchanges. See, e.g.*, Gov't.Resp.Br.21 n.4, *Little Sisters v. Sebelius* (10th Cir. 2014) (No. 13-1540).

Indeed, the government cannot seriously mean to suggest that asking people to "take steps to learn about, and to sign up for, a new health benefit" renders the Exchanges an infeasible alternative for *anyone*. 78 Fed. Reg. at 39,888. A "less restrictive alternative" is not "ineffective" just because it "requires a consumer to take action, or may be inconvenient." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 824 (2000). Consumers have to learn about and sign up for *any* health plan—whether employer-sponsored or otherwise. And if they want dental or vision coverage, they will often have to take those steps twice (and use

a separate insurance card to utilize those separate benefits). The whole point of the Exchanges, moreover, was to make obtaining insurance through someone other than an employer as convenient as possible—which presumably explains why the government has no problem expecting the tens of millions of individuals whose employers are already exempt to use them.

The government protests that expecting petitioners' employees to use the Exchanges should they want to obtain contraceptive coverage would "severely penalize" them by forcing them to "give up 'part of [their] compensation package.'" Resp.Br.77. But here, too, the exact same thing could be said of employees with grandfathered plans or exempt religious employers. If they want a plan that includes contraceptive coverage, they must "give up" their employer-sponsored coverage and obtain a different plan elsewhere. Indeed, individuals routinely "give up" that benefit when a family member's employer offers a more attractive health plan.

The government alternatively protests that petitioners' employees may not currently be eligible for subsidies on the Exchanges. But even assuming that is correct, again, the same is true for employees of employers with grandfathered plans, or exempt religious employers, or small businesses. They are not automatically entitled to a subsidy just because they lack access to an employer-sponsored plan that includes contraceptive coverage. Instead, employees of small businesses will qualify for subsidies only if they satisfy the ACA's income limits, and those with grandfathered plans or exempt religious employers

may not qualify at all. *See* 26 U.S.C. §36B(b)-(c). Yet the government apparently still considers the Exchanges sufficient to achieve any compelling interest it may have as to those employees, notwithstanding whatever "financial, logistical, or administrative hurdles" the Exchanges may entail. Resp.Br.74.

Moreover, even if the government considers subsidies essential for petitioners' employees (but no others), that hardly means that the Exchanges are not an "existing, recognized, workable, and already-implemented framework to provide [contraceptive] coverage" to petitioners' employees without involving petitioners. *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring). Extending subsidies to whatever subset of those employees actually wants contraceptive coverage would not require "imposition of a whole new program or burden on the Government." *Id.* It would just require tweaking the eligibility criteria for a burden that the government has already voluntarily taken on. To the extent the government claims that is simply too much to ask, the "view that RFRA can never require the Government to spend even a small amount reflects a judgment about the importance of religious liberty that was not shared by the Congress that enacted that law." *Id.* at 2781 (Alito, J.). And having spent billions of dollars creating the Exchanges and billions more subsidizing their use, the government cannot credibly claim that it absolutely must draw the fiscal line here.[4]

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[4] In fact, the government is already using the Exchanges to cover costs attributable to getting contraceptive coverage to employees of objecting employers: TPAs that arrange for the

Of course, the Exchanges are not the only means through which the government can ensure that all women have access to cost-free contraceptive coverage. The government also has at the ready Title X, a program that would avoid any concerns about forcing employees of exempt employers to "give up 'part of [their] compensation package.'" Resp.Br.77. The government asserts (in a footnote) that harnessing Title X to achieve that end is impracticable because existing regulations impose income-limits on who qualifies for free Title X assistance. Resp.Br.83 n.35. But those same regulations confirm HHS's willingness to employ a flexible conception of the program's income-based priorities. *See, e.g.*, 42 C.F.R. §59.2. And this Court has long rejected the argument that the only less restrictive means that count are those that would require absolutely no government action. *See, e.g.*, *McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014); *McCutcheon v. FEC*, 134 S. Ct. 1434, 1458 (2014); *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 669 (2004).

The government faces the same problem with its claim that all other avenues must be rejected because petitioners' employees might "suffer" during the transition period while they are being implemented. Resp.Br.84. Setting aside the reality that petitioners' employees can obtain plans with contraceptive coverage on the Exchanges *right now*, the least-restrictive means test looks to all *available*

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provision of contraceptive coverage when an employer complies via the regulatory mechanism are reimbursed through reductions in issuer user fees on the Exchanges. 26 C.F.R. §54.9815-2713A(b)(3).

alternatives, not just those already in place. *See, e.g.*, *Holt*, 135 S. Ct. at 864. As *Hobby Lobby* confirms, that principle applies equally to RFRA claims involving "benefits" to a third party. Resp.Br.84. The less restrictive means the Court identified to remedy the religious objections raised there were not available to for-profit companies *at the time*, but the Court found it sufficient that the government "ha[d] at its disposal" the ability to *make* them available. *Hobby Lobby*, 134 S. Ct. at 2782. At any rate, if neither Congress nor the agencies are willing to expediently adopt an alternative that the government considers sufficient, then that once again prompts the question how the government can really claim its interests are so compelling as to override sincere religious beliefs.

* * *

In the end, the existing exemptions to the contraceptive mandate put the government in a bind. The government cannot explain why its regulatory scheme appears to "leave[] appreciable damage to [its] supposedly vital interest unprohibited," *Lukumi*, 508 U.S. at 547, because there are only two plausible explanations, both of which are fatal to its case: Either the contraceptive mandate does not further a compelling interest, or the government is capable of achieving its compelling interest without enlisting the aid of all employers. Whether the government is willing to acknowledge it or not, at least one of those things must be true, for it is simply implausible that the government would exempt the employers of tens of millions of employees if doing so caused appreciable damage to a compelling government interest. Ultimately, it matters little which explanation this

Court finds more satisfying, for both lead to the same result: The government has failed to demonstrate that requiring petitioners to comply with the contraceptive mandate is the "least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. §2000bb-1(a)(2).

CONCLUSION

The Court should reverse the judgments below.

Respectfully submitted,

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